STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: INTERSTATE 35 TELEPHONE COMPANY, d/b/a INTERSTATE COMMUNICATIONS, and SOUTHWEST TELEPHONE EXCHANGE INC., d/b/a INTERSTATE COMMUNICATIONS	DOCKET NO. DRU-02-4

DECLARATORY ORDER

(Issued October 18, 2002)

On August 20, 2002, Interstate 35 Telephone Company, d/b/a Interstate Communications, and Southwest Telephone Exchange Inc., d/b/a Interstate Communications (collectively "Interstate"), filed a petition for declaratory order with the Utilities Board (Board) presenting the following specific questions for consideration:

> 1. Is the exemption from rate regulation by the Board contained in Iowa Code Section 476.1 for ILECs having fewer than 15,000 customers and fewer than 15,000 access lines impaired or adversely impacted by the Board's authority under Iowa Code Section 476.11 to regulate "terms and procedures" for toll communications; and
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> 2. Are the rates for exchange access services provided by ILECs having fewer than 15,000 customers and fewer than 15,000 access lines exempt under Section 476.1 from rate regulation by the Board?

Qwest Corporation (Qwest) and AT&T Communications of the Midwest, Inc. (AT&T), were granted intervention in the Board's September 19, 2002, order.

Additionally, WorldCom, Inc. (WorldCom), Iowa Telecommunications Association (ITA), Rural Iowa Independent Telephone Association (RIITA), and a group of municipal competitive local exchange carriers (CLEC's)[1] (Muni CLECs) filed petitions for intervention, which will be granted by the Board. The Consumer Advocate Division of the Department of Justice (Consumer Advocate) also filed comments.

Generally, Interstate, RIITA, ITA, and the Muni CLECs argue the Board has absolutely no ratemaking jurisdiction pursuant to § 476.1[2] in relation to those companies. These parties argue that rates for exchange access services provided by carriers having fewer than 15,000 customers and fewer than 15,000 access lines are exempt from rate regulation pursuant to § 476.1 and that no other statute negates that exemption.

Conversely, Qwest, AT&T, WorldCom, and Consumer Advocate argue that § 476.11, which gives the Board jurisdiction to resolve complaints pertaining to telephone toll connections brought to it by public utilities, necessarily includes the jurisdiction to review rates for reasonableness. Additionally, Qwest, AT&T, WorldCom, and Consumer Advocate argue the Board has jurisdiction by virtue of § 476.3, which provides for written complaints to be filed requesting the Board determine the reasonableness of the rates, charges, schedules, service, regulations,

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[1] The Municipal CLEC's include: Algona Municipal Utilities, Alta Municipal Broadband Communications Utility, Coon Rapids Municipal Communications Utility, Grundy Center Municipal Communications Utility, Harlan Municipal Utilities, Hawarden Municipal Utilities, Laurens Municipal Broadband Communications Utility, Osage Municipal Communications Utility, Reinbeck Municipal Telecommunications Utility, Spencer Municipal Utilities, The Community Cabletelevision Agency of O'Brien County, d/b/a The Community Agency and TCA.

[2] All statutory references are to Iowa Code (2001) unless otherwise specified.

or anything done, or omitted to be done, by a public utility. These parties argue that any other conclusion would allow unreasonable rates to be charged with no opportunity for review. Each of these statutory provisions will be discussed in turn.

Iowa Code § 476.1

Iowa Code § 476.1 (2002) states in part:

> Mutual telephone companies in which at least fifty percent of the users are owners, co-operative telephone corporations or associations, telephone companies having less than fifteen thousand access lines, municipally owned utilities, unincorporated villages which own their own distribution systems are not subject to the rate regulation provided for in this chapter.

Based on the plain reading of this statute, Interstate[3] argues that the Board is without **any** jurisdiction to regulate the rates of it or any similarly situated public utility. The Legislature, in adopting § 476.1, clearly intended to remove small ILECs from the Board's general rate regulation authority.

The Board concludes that § 476.1 provides an unambiguous exemption to the small ILECs from the rate regulation provisions of chapter 476. However, it does not exempt rate regulatory authority from other sources. Also, the Board retains its regulatory authority over the service of these small ILECs, except where the legislature has specifically removed that authority.

[3] For purposes of this order, any discussion of the position of "Interstate" should be construed as being the position of Interstate, RIITA, ITA, and the Muni CLECs, collectively.

Iowa Code § 476.3

Interstate also argues that § 476.3, which provides for the filing of a written complaint requesting the Board to determine the reasonableness of rates of a public utility, does not apply, thus eliminating the Board's ability to address any finding that rates are unreasonable. Interstate argues that the Board should not apply any statutory interpretation in trying to reconcile the separate statutes. Interstate suggests that it is "mandatory for the Board to carry out its duty to provide this exemption . . ." to those qualifying carriers.[4]

AT&T[5] argues that § 476.3(1) requires a public utility to furnish reasonably adequate service at rates and charges in accordance with tariffs filed with the Board. It further provides a mechanism to resolve complaints regarding the reasonableness of rates. Complaint proceedings may be initiated by a complainant, or the public utility, or by the Board on its own motion. After hearing, if the Board finds the public utility's rates to be unjust, unreasonable, discriminatory, or otherwise in violation of any provision of law, the Board shall determine just, reasonable, and non-discriminatory rates.

The Board concludes that § 476.3 is one of the rate regulation provisions in chapter 476 from which § 476.1 exempts the small ILECs.

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[4] *See* Statement of Position, Interstate, filed September 30, 2002, p. 3.

[5] For purposes of this order, any discussion of the position of "AT&T" should be construed as being the position of AT&T, Qwest, WorldCom, and OCA, collectively.

Iowa Code § 476.8

AT&T also argues that § 476.8 requires that **every** public utility furnish reasonably adequate services and facilities and that the charge for furnishing such services "**shall** be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful." (Emphasis added.) For the Board to be restricted from making a determination that the rates and charges for access services of ILECs having fewer than 15,000 customers and fewer than 15,000 access lines would strip this statutory section of any meaning as to those ILECs. Section 476.8 does not contain any limitations as to which public utilities are subject to its mandate. It specifically requires "every" public utility to furnish reasonably adequate services and that those services "shall" be provided at reasonable and just rates.

Once again, § 476.8 is one of the rate regulation provisions from which § 476.1 exempts the small ILECs.

Iowa Code § 476.11

While admitting to being a "public utility," pursuant to § 476.1, Interstate argues that the language of § 476.11 does not permit the Board to resolve a complaint regarding rates. Rather, these parties argue that the Board has the authority to resolve complaints involving "terms and conditions," excluding any complaint regarding the rates or charges. Section 476.11 states:

> Whenever toll connection between the lines or facilities of two or more telephone companies has been made, or is demanded under the statutes of this state and the companies concerned cannot agree as to the terms and

> procedures under which toll communications shall be interchanged, the board upon complaint in writing, after hearing had upon reasonable notice, shall determine such terms and procedures.
>
> The board may resolve complaints, upon notice and hearing, that a utility, operating under section 476.29, has failed to provide just, reasonable, and nondiscriminatory arrangements for interconnection of its telecommunications services with another telecommunications provider.

AT&T contends that § 476.1 does not exempt intrastate exchange switched access services provided by ILECs having fewer than 15,000 customers and fewer than 15,000 access lines from the Board's jurisdiction, authority, and duty upon complaint pursuant to § 476.11, to determine the terms and procedures, including rates for intrastate exchange access services, for the interchange of toll communications.[6]

These parties argue that the Board is required to determine the appropriate terms and procedures where a toll connection between the lines or facilities of two or more telephone companies exists and the companies concerned cannot agree. Section 476.11 specifies, "the board upon complaint in writing, after hearing had upon reasonable notice, **shall** determine such terms and procedures." (Emphasis added.) In a case involving a dispute concerning the point of connection between a long distance company and a local exchange company, the Iowa Supreme Court

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[6] *See* Statement of Position, Consumer Advocate, filed September 30, 2002, p. 1.

implied that the phrase "terms and procedures" is not limited to financial matters.[7] Although this could suggest that all "financial matters" are included within the scope of the phrase "terms and procedures," including rates and charges for switched access services, the issue was not before the court for review.

AT&T's construction of § 476.11 correctly identifies it as a section in chapter 476 that provides for rate regulation. As such, it is covered by the exemption in § 476.1 for small ILECs.

Previous Board Action

The recent Board order in Docket No. FCU-00-3[8] (the FiberComm case), which was argued by AT&T to be dispositive of the jurisdictional question, is readily distinguishable. AT&T states:

> This very issue has been recently addressed by the Board in Fibercomm et al. v. AT&T, FCU-00-3, in which the Board held that it had authority to determine reasonable rates and charges of interconnection; and found the carrier common line charge of three cents per minute to be excessive; and order the CLECs to file new tariffs in which they reduce the carrier common line charge to zero.[9]

However, the public utilities involved in the FiberComm case were CLECs. The Board found its jurisdiction pursuant to § 476.101(1), which provides that if the Board determines that a CLEC possesses market power in its local exchange

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7 *See Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.*, 165 N.W.2d 771, 775 (Iowa 1969).

8 *Fibercomm, L.C., Forest City Telecom, Inc., Heart of Iowa Communications, Inc., Independent Networks, L.C., and Lost Nation-Elwood Telephone Company v. AT&T Communications of the Midwest, Inc.,* Final Decision and Order, issued October 25, 2001.

9 AT&T Response to Petition for Declaratory Order, Motion to Dismiss or to Consolidate and Recast Pleading, filed September 12, 2002, p. 3.

market, other provisions of chapter 476 can be applied as appropriate. The statute does not give the Board the same authority to investigate the market power of small ILECs and apply other provisions of chapter 476 to them.

The Board notes that 199 IAC 22.14(2)"b," which states in part

> b. A non-rate-regulated local exchange utility in its general tariff may concur in the intrastate access tariff filed by another non-rate-regulated local exchange utility.
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> … … …
>
> (2) All elements of the filings, under rule 22.14(476) including access service rate elements, shall be subject to review and approval by the board.

is an unlawful rule on its face, as applied to small ILECs. To require that a "non-rate-regulated" local exchange utility's rates be subject to review and approval by the Board is irreconcilable with the exemption in § 476.1. The Board cannot extend its jurisdiction to rates in an administrative rule when that jurisdiction was specifically exempted by statute.

IT IS THEREFORE ORDERED:

1. The petitions for intervention of WorldCom, Inc., Iowa Telecommunications Association, Rural Iowa Independent Telephone Association, and a group of municipal CLECs[10] are granted.

[10] The Municipal CLEC's include: Algona Municipal Utilities, Alta Municipal Broadband Communications Utility, Coon Rapids Municipal Communications Utility, Grundy Center Municipal Communications Utility, Harlan Municipal Utilities, Hawarden Municipal Utilities, Laurens Municipal Broadband Communications Utility, Osage Municipal Communications Utility, Reinbeck Municipal Telecommunications Utility, Spencer Municipal Utilities, and The Community Cabletelevision Agency of O'Brien County, d/b/a The Community Agency and TCA.

2. The Board grants the request for declaratory order, as follows:

a. Incumbent local exchange carriers having fewer than 15,000 customers and fewer than 15,000 access lines are exempted by § 476.1 from the Utilities Board's authority to set rates pursuant to § 476.11.

b. Exchange access services provided by ILECs having fewer than 15,000 customers and fewer than 15,000 access lines are exempt under § 476.1 from the rate regulation provided for in chapter 476.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

CONCURRENCE OF ELLIOTT G. SMITH
DOCKET NO. DRU-02-4

I understand and appreciate the perspective of my colleagues as to whether the Iowa Utilities Board (the Board) has jurisdiction to hear arguments regarding rates charged for access services provided by incumbent local exchange carriers. This is a difficult issue with strong arguments on both sides. While I ultimately concur with the outcome stated in the declaratory order above, there exists enough ambiguity within chapter 476 of the Iowa Code to leave me conflicted as to legislative intent in this area, i.e., do the rules of statutory construction give the Board jurisdiction to review access fees for reasonableness?

The fact that I note my struggle with legislative intent through this concurrence in no way preordains any decision I might make on the substantive issues surrounding the propriety of access rates charged. My focus is purely on whether the Board has been legislated authority to, at the very least, bring such a matter to hearing.

This issue turns on interpretation of language within chapter 476 of the Code of Iowa. Generally, petitioner Interstate 35 Telephone Company, d/b/a Interstate Communications, and Southwest Telephone Exchange, Inc., d/b/a Interstate Communications, along with interveners Rural Iowa Independent Telephone Association, Iowa Telecommunications Association, and a group of municipal competitive local exchange carriers argue that the Board has no ratemaking jurisdiction in relation to them pursuant to Iowa Code section 476.1. That section states, in part:

> Mutual telephone companies in which at least fifty percent of the users are owners, co-operative telephone corporations or associations, telephone companies having less than fifteen thousand access lines, municipally owned utilities, unincorporated villages which own their own distribution systems are not subject to the rate regulation provided for in this chapter.

Iowa Code § 476.1 (2001)

Conversely, the Office of Consumer Advocate and interveners AT&T Communications of the Midwest, Inc. (AT&T), Qwest Corporation, and WorldCom, Inc. believe that Iowa Code section 476.11 gives the Board the necessary jurisdiction

to resolve complaints brought to it by public utilities. This would include a review of access rates for reasonableness. The language in section 476.11 that I believe introduces ambiguity regarding the scope of the Board's jurisdiction resides in the second paragraph, which states:

> The board may resolve complaints, upon notice and hearing, that a utility, *operating under section 476.29*, has failed to provide just, reasonable, and nondiscriminatory arrangements for interconnection of its telecommunications services with another telecommunications provider.

Iowa Code § 476.11 (2001) *(emphasis added*)

Iowa Code sections 476.29(1) and (12) require the Board to issue "certificates of public convenience" for ***any*** utility wishing to provide land-line local telephone service in Iowa, including municipals and cooperatives. A utility "must" have such a certificate in order to do business in the state. Otherwise, it will not be allowed to construct, install, or operate lines or equipment for the purpose of furnishing service.

Here is where the conflict arises and ambiguity weighs-in. The Iowa General Assembly passed Section 476.1 in 1963, exempting small telephone companies from rate regulation authority of the Board. However, the second paragraph of section 476.11 and all of section 476.29 were passed by the Iowa General Assembly in the 1990s, containing statutory language that has a 'notwithstanding' effect on the prohibition against Board review and regulation stated in 476.1. Through this later-in-time action, the Legislature has effectively given the Board authority to resolve

complaints lodged against the universe of telephone utilities that have been provided a certificate of public convenience to operate in the state.

Iowa Code section 4.8 gives precise direction when irreconcilable differences exist in statutory language. It states:

> If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails.

Iowa Code § 4.8 (2001). I am not settled in my own mind as to whether sections 476.1, 476.11, and 476.29 are reconcilable. As a result, I will not automatically dismiss the argument presented by AT&T and its supporters that the Iowa General Assembly has, in fact, given the Board rate regulation authority over municipal and cooperative telephone companies through the amendments it has made to chapter 476 over the last ten years. By the same token, I am not inclined to automatically dismiss the policy of rate regulation exemption granted small telephone companies some 39 years ago. I believe it is incumbent upon State lawmakers to lend clarity to this perceived conflict of legislative intent. The specific questions to consider are:

1. Pursuant to section 476.1, are telephone companies having fewer than 15,000 customers and fewer than 15,000 access lines ***fully*** exempt from rate review and regulation by the Board?

2. Pursuant to the second paragraph section 476.11, *may the Board resolve* duly noticed complaints against a utility, operating under section 476.29, alleging arrangements for interconnection of telecommunication services with another telecommunications provider that fail to be just, reasonable, and nondiscriminatory?

Once this ambiguity that resides in chapter 476 is resolved, the Board can act with confidence and without hesitation when it comes to questions of regulatory jurisdiction and authority over the telecommunications industry in Iowa.

With these concerns of mine duly noted, I will respectfully concur with the attached order.

/s/ Elliott Smith

ATTEST:

/s Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 18th day of October, 2002.